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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SANDERS INC. ARCHITECTURE/ENGINEERING, Plaintiff and Appellant, v. THE BOARD OF TRUSTEES OF CALIFORNIA STATE UNIVERSITY, Defendant and Respondent.	D043591 (Super. Ct. No. GIC807334)

APPEAL from a judgment of the Superior Court of San Diego County, Wayne L. Peterson, Judge. Reversed.

Sanders Inc. Architecture/Engineering (Sanders) appeals the sustaining of a demurrer without leave to amend on its complaint for breach of contract against The Board of Trustees of California State University[1] (CSU). Sanders contends the trial court erred in finding its complaint was barred by the statute of limitations. We reverse.

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1 The Board of Trustees of California State University was erroneously sued as Trustees of the California State University.

FACTS

In May 2001, Sanders entered into a contract with CSU to provide a telecommunications infrastructure upgrade at San Diego State University. Under the contract, CSU was obligated to provide Sanders with "the supporting documentation necessary for Sanders to determine the existing condition and configuration of the voice, data, and video systems from which Sanders could then create documents reflecting the desired improvements." (Emphasis omitted.)

Sanders alleged that despite fully performing its obligations under the contract, on March 28, 2002, CSU wrote to Sanders stating Sanders had not properly performed the contract, terminating the contract and requesting Sanders provide a final invoice. Sanders disputed CSU's decision and right to terminate the contract by letters written in April and May 2002.

On August 19, 2002, Sanders submitted a final invoice to CSU. Sanders alleged it "received notice from CSU that it refused to fully pay [the] final invoice" on or about September 16, 2002.

On March 17, 2003, Sanders filed a breach of contract action against CSU. Following the sustaining of a demurrer, Sanders amended the complaint. Sanders alleged in its first amended complaint that CSU breached the contract by: "failure to provide the necessary as-built information and documentation; failure to provide as-built documentation that was accurate and up to date as to floor plan layout; failure to provide as-built documentation that was drawn to scale; unreasonable delay in providing the as-built information it did possess; unilateral[] termination of the contract; and failure to pay

Sanders for the work performed, including the refusal to pay Sanders the full amount of its final invoice." (Emphasis omitted.) Sanders sought damages of over $350,000 for the costs of its labor and services required under the contract and incurred "in seeking to discover, and document, the actual as-built condition of the campus," and for "lost profits as a result of the wrongful termination."

CSU demurred to the first amended complaint on the basis it was not filed within the six month limitations period contained in Public Contract Code Section 19100, subdivision (a). The court sustained the demurrer without leave to amend and ordered the action dismissed. A judgment of dismissal was entered on January 5, 2004.

DISCUSSION

I

Standard of Review

"A demurrer tests the sufficiency of a complaint by raising questions of law. [Citation.] In determining the merits of a demurrer, all material facts pleaded in the complaint and those that arise by reasonable implication, but not conclusions of fact or law, are deemed admitted by the demurring party." (*Rodas v. Spiegel* (2001) 87 Cal.App.4th 513, 517.) " ' "We also consider matters which may be judicially noticed." ' " (*Robbins v. Blecher* (1997) 52 Cal.App.4th 886, 892.) "[J]udicially noticeable facts may supersede any inconsistent factual allegations contained in a complaint." (*City of Chula Vista v. County of San Diego* (1994) 23 Cal.App.4th 1713, 1719.) "A plaintiff may not avoid a demurrer by . . . suppressing facts which prove the pleaded facts false." (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877.)

A trial court may properly grant a demurrer on the basis the action is barred by a statute of limitations. (See *Leasequip, Inc. v. Dapeer* (2002) 103 Cal.App. 4th 394, 400.) Sustaining a demurrer without leave to amend is within the trial court's discretion if the plaintiff is unable to show there is a reasonable possibility any defect can be cured by amendment. (*Trader Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 43-44.)

II

Judicial Notice

CSU seeks judicial notice of the contract, the March 28, 2002 letter terminating the contract, and letters CSU wrote to Sanders on April 11, May 2, and September 10, 2002, responding to Sanders's demand for payment and making offers of payment. CSU contends judicial notice is proper under Evidence Code section 452, subdivision (c), which allows judicial notice to be taken of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." We decline to take judicial notice.

First, we note the trial court declined to take judicial notice of the documents, having ruled that the face of the first amended complaint established it was time-barred. Thus, these documents were not encompassed within the trial court's decision.

Second, it is not necessary to our decision to take judicial notice of the contract. The precise written terms of the contract are not at issue here.[2]

Third, we decline to take judicial notice of the various letters. We reject CSU's argument these documents constitute "official acts"; rather they represent correspondence between CSU, and a contractor, Sanders. The fact the letters were signed by CSU officials and bind CSU to certain positions does not convert the correspondence into "official acts" within the meaning of Evidence Code section 452, subdivision (c). Under CSU's theory, nearly all correspondence by a government employee would qualify as an "official act," a result that seems to us far beyond the scope of what the Legislature intended. Moreover, taking judicial notice of the content of the letters would be inappropriate in the context of the demurrer at issue since these letters, at best, present only CSU's side of the correspondence between the parties. Further, there may have been additional letters or negotiations that are not encompassed within the letters submitted by CSU. Additionally, it is possible that in response to these items, Sanders could present other evidence disputing the truth of the matters asserted within the letters. When, as here, the items sought to be judicially noticed raise potential factual conflicts, it is inappropriate to take judicial notice on a demurrer. (See *Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134-1135.) While these documents, if properly

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2 We note Sanders failed to attach to his complaint a copy of the written contract or set forth the exact terms of the contract in his first amended complaint (see 5 Witkin, Calif. Procedure (4th ed. 1997), Pleading, § 479, pp. 572-573) and yet quoted from the contract in his opposition to the demurrer and in his appellate briefs. Sanders did not oppose CSU's request for judicial notice of the contract.

authenticated, could be submitted in support of a motion for summary judgment, here we are faced with a demurrer. We decline CSU's request for judicial notice.

III

Limitations Period

To recover on a cause of action for breach of contract, the plaintiff must establish: (1) the existence of a contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damage to plaintiff as a result of defendant's breach. (*Regan Roofing Co. v. Superior Court* (1994) 24 Cal.App.4th 425, 434-435; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) As a general rule, a cause of action for breach of contract arises on the date of the breach. (*Budd v. Nixen* (1971) 6 Cal.3d 195, 203, fn. 6.) Public Contract Code section 19100, subdivision (a) requires a breach of contract lawsuit to be filed within six months. In some cases, where a party repudiates a contract before the time for performance has arrived, the other party has the option of bringing suit immediately or treating " 'the repudiation as an empty threat' " and waiting until the time of the actual breach. (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 489.)

Here, among the breaches Sanders alleged in his first amended complaint was CSU's refusal to compensate it for its performance under the contract. This breach occurred when CSU notified Sanders of its refusal to pay the full amount of Sanders's final invoice. Sanders alleged it "received notice from CSU that it refused to fully pay [the] final invoice" on or about September 16, 2002.

CSU concedes that if Sanders's cause of action accrued on September 16, 2002, then the complaint filed on March 17, 2003 was timely,[3] but argues that Sanders must be charged with having received notice at least two days earlier. CSU reasons that since "similar limitations periods affecting the State" begin when notice is deposited in the mail (see, e.g., Gov. Code, § 945.6), notice must be calculated as of the time CSU deposited the notice in the mail. CSU argues: "Given that [Sanders] confirms receipt of the Notice by September 16 (a Monday), [the Notice] would have been deposited in the mail no later than September 13 (a Friday, the first business day prior to Monday, September 16), but in no event could it have been deposited any later than Saturday, September 14, 2002 (the last day before the 16th that any post office would have been open)."

There are several problems with this argument. First, Public Contract Code section 19100, subdivision (a) does not state the limitations period begins upon a government entity's mailing of notice denying a claim for breach of contract. Indeed, Public Contract Code section 19100, subdivision (a)(2), specifically provides that it is not necessary for a claim to be filed with the government entity prior to bringing a lawsuit if there are no contract claim provisions. Second, the allegations in the first amended complaint do not state Sanders received notice in the mail; it merely states he "received notice" of CSU's refusal on September 16, 2002. Sanders could have received notice Monday, September 16, by telephone, by an in-person conversation, by fax, or by a

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3 As CSU states, "although March 17 is six months and one day from September 16, March 16 was a Sunday" and therefore the complaint was filed on the last day within the limitations period.

messenger delivering written notice. The allegations of the complaint were sufficient to establish Sanders received notice on September 16, 2002.

CSU also contends the six-month limitations period began to run in March 2002 when CSU wrote a letter terminating the contract. As CSU points out, Sanders's first amended complaint contained allegations that CSU breached the contract by unilaterally terminating the contract in March 2002 and by committing wrongful acts prior to the March 2002 termination letter (for example, not providing sufficient documentation). The fact CSU may have committed additional, earlier breaches does not undermine the finding Sanders's complaint was timely as to a breach occurring within the limitations period, that is, the failure to pay the full amount owing.

DISPOSITION

We reverse. Sanders is entitled to its costs on appeal.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

HALLER, J.